THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOMERSET COMMUNICATIONS GROUP, LLC, Plaintiff, v. WALL TO WALL ADVERTISING, INC., *et al.*, Defendants.	CASE NO. C13-2084-JCC ORDER DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Dkt. No. 25). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the Motion for the reasons explained herein.

I. BACKGROUND

Plaintiff Somerset Communications Group, LLC ("Somerset") sues Defendants Wall to Wall Advertising, Inc. ("W2W"), Donald and Andrea MacCord, Shannon and Tracey Doyle, and S.D. Doyle, Ltd. for securities fraud in connection with the purchase of shares of Fourpoints Holding, LLC ("FPH"). (Amended Complaint, Dkt. No. 24.) FPH was formed by W2W, Lubin Outdoor, LLC ("Lubin"), and Fourpoints Investors ("FP Investors") for the purpose of holding and operating Fourpoints Communications, LLC ("FPC"), a company that sold and operated

digital billboards on Native American Trust Lands. (*Id*. at ¶ 3.2–3.3.) Donald MacCord ("MacCord") was the sole shareholder and President of W2W, and the Chief Executive Officer of FPH. (*Id*. at ¶ 1.3.) Shannon Doyle ("Doyle") was the Chief Financial Officer of FPH. (*Id*. at ¶ 1.4.) The Amended Complaint alleges that FPH was initially funded through a $5.5 million dollar capital investment by FP Investors, a $1.5 million dollar investment by W2W, and a $1.1 million dollar investment by Lubin, with the promise of an additional $6.5 million dollar investment from FP Investors. (*Id*. at ¶ 3.4.) Under FPH's operating agreement, all manager members were required to consent to the sale of any units of stock. (*Id*. at ¶ 3.52.)

In May/June of 2009, MacCord approached William Moore with an offer to purchase a minimum of a five percent stake in FPH for $2 million. (*Id*. at ¶ 3.17.) The Amended Complaint states that over the next six months, MacCord and Doyle aggressively courted Moore to undertake the purchase of the stock. During this time, MacCord and Doyle made numerous statements to Moore and sent him five different documents between June 2009 and February 2010 detailing FPH's business plans and financial status. (*Id*. at ¶¶ 3.19; 3.30; 3.41; 3.44; 3.54.) Each of these documents, Plaintiff alleges, indicated that FPC had a steady income stream and plans for aggressive expansion. (*Id.*) Specifically, these documents allegedly indicated that FPC had significant and ongoing revenue from two signs in California (the "Pala Signs") and that FP Investors would be investing an additional $6 million. (*Id.* at ¶¶ 3.28; 3.45.) According to the Amended Complaint, neither of these statements was true: the California signs were either "terminated" or "turned off" before June 2009 (*id*. at ¶ 3.11) and by late July 2009, FPC was insolvent (*id.* at ¶ 3.13). Plaintiff alleges that MacCord and Doyle failed to mention in any of their communications that FPH was "functionally insolvent," and falsely stated revenue figures and concealed that FP Investors had pulled their funding. (*Id*. at ¶¶ 3.12.)

Allegedly lacking knowledge of all of this, in November 2009, Moore formed Somerset with the intent of using it to purchase shares of FPH from W2W. (*Id*. at ¶ 3.50.) The month before, MacCord and Doyle allegedly represented to Moore that MacCord wished to sell W2W's

shares to Somerset to secure operational capital for three lucrative investment ventures. In reality, the Amended Complaint alleges, MacCord and Doyle sought and ultimately used Somerset's investment to keep FPH afloat despite its then-undisclosed serious financial troubles. (*Id*. at ¶ 3.47; 3.48.) Between December 2009 and August 2010, Somerset made nineteen purchases of FPH stock from W2W, investing $2,028,000 in return for a 5.5 percent stake in the company. (*Id*. at ¶ 3.57.) The Amended Complaint states that MacCord and Doyle informed Somerset that the other managing partners, Lubin and FP Investors, had consented to the sale, as was required by FPH's operating agreement. (*Id*.) However, neither of these two partners was informed of the sale, the Amended Complaint alleges, and either MacCord or Doyle forged the consent forms for each sale of stock. (*Id*.) MacCord and Doyle then allegedly used Somerset's investment not for new lucrative ventures, as had been promised, but rather to pay FPC's operating expenses and interest payments on a loan from FP Investors, all without informing Somerset. (*Id*. at ¶ 3.55.) Somerset did not learn of FPC's financial troubles until it was informed that MacCord and Doyle had been terminated in November 2010. (*Id*. at ¶ 3.73.) Shortly afterwards, Somerset learned that the consent forms had been forged and that FPH believed Somerset to have no membership interest in the company. (*Id*. at ¶ 3.75.)

Somerset now brings six claims for securities fraud under federal law (Section 10b of the Securities Exchange Act of 1934/ Rule 10b-5 claims) and state law (Washington Securities Act) arising from the misrepresentations and omissions MacCord and Doyle allegedly made before and during the investment process. (Amended Complaint, Dkt. No. 24, § IV.) Specifically, Somerset claims that Defendants (1) falsely represented assets and revenues of FPH, including the "Pala Indian Tribe deal" and inflated accounts receivable (*id*. at ¶ 4.3); (2) fraudulently omitted the fact that FPH was "essentially insolvent" on repeated occasions (*id*. at ¶ 4.10); (3) fraudulently valued the company almost $30 million dollars above its true-market value (*id*. at ¶ 4.16); (4) fraudulently omitted that Lubin was reducing its interest in FPH by selling its common units to MacCord and W2W at a price much lower (forty percent) than the price offered to

Somerset (*id*. at ¶ 4.22); (5) fraudulently omitted that FPH was in a forbearance agreement deferring its interest payment to FP Investors (*id*. at 4.28); and (6) forged FP Investors' and Lubin's signatures on consent forms for the sale of units to Somerset (*id*. at ¶ 4.34).

In January 2014, Defendants moved to dismiss Somerset's claims, on the grounds that Somerset failed to plead sufficient facts as to materiality, scienter, and causation under the heightened standard for securities fraud. (Defendants' Motion to Dismiss, Dkt. No. 15.) This Court found that while Somerset had met its burden with regard to claim six on federal grounds and with regard to claims three and six under state law, Somerset had failed to meet the heightened pleading requirements for claims one through five on federal law grounds and claims one, two, four and five on state law grounds. (Order, Dkt. No. 20.) Availing itself of this Court's dismissal without prejudice, Somerset filed an Amended Complaint on May 27th, 2014. (Amended Complaint, Dkt. No. 24.) Defendants, alleging persistent failure to comport with the heightened pleading requirements of Rule 10b-5, filed a Motion to Dismiss the Amended Complaint (Dkt. No. 25), which is now before the Court.

II. DISCUSSION

A. Motion to Dismiss Legal Standard

A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To withstand a Rule 12(b)(6) motion to dismiss, a complaint must "provide more than a formulaic recitation of the elements of a cause of action, and must assert facts that raise a right to relief above the speculative level." *Lyons v. Homecomings Fin. LLC*, 770 F. Supp. 2d 1163, 1166 (W.D. Wash. 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). When considering a Rule 12(b)(6) motion, the court must take "all well-pleaded factual allegations as true and to draw all reasonable inferences therefrom in favor of the plaintiff." *Wyler Summit P'ship v. Turner Broadcasting Sys., Inc.*, 135 F.3d 658, 663 (9th Cir. 1998). A court is not required to accept as true, however, "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re*

Gilead Sciences Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008).

In addition to the above "plausibility" standard, a complaint raising Rule 10b–5 fraud claims must also satisfy the "particularity" requirement of Federal Rule of Civil Procedure 9(b) and the heightened pleading requirements of the Private Securities Litigation Reform Act ("PSLRA"). *Reese v. BP Exploration (Alaska) Inc*., 643 F.3d 681, 690 (9th Cir. 2011); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1047 (9th Cir. 2011). Under Rule 9(b), a complaint pleading fraud must "state with particularity the circumstances constituting fraud or mistake." *Capitol W. Appraisals, LLC v. Countrywide Fin. Corp.*, 759 F. Supp. 2d 1267, 1271 (W.D. Wash. 2010) (citing *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)). This requirement is best understood as requiring a plaintiff to identify the "who, what, when, where, and how of the misconduct charged." *Id*.

Moreover, the PSLRA requires that a securities fraud plaintiff "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, . . . all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1)(B); *see Reese*, 643 F.3d at 690.

B. **Federal Securities Law Claims**

Section 10(b) of the 1934 Act makes it unlawful "for any person, directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. §§ 78j; 78j(b). Rule 10b–5, promulgated under Section 10(b), in turn provides that "[i]t shall be unlawful for any person . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005) (citing 17 C.F.R. § 240.10b–5). In order to state a claim under Rule 10b–5, a plaintiff must plead: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between

the misrepresentation or omission and the purchase or sale of a security [transaction causation]; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *WPP Luxembourg*, 655 F.3d at 1048. As in their first Motion to Dismiss, Defendants again assert that Plaintiff's Amended Complaint fails to adequately plead materiality, scienter, and causation. The Court examines Plaintiff's reattempts to plead these elements.

1. **Materiality**

A misrepresentation or omission is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix of information made available." *Reese v. Malone*, 747 F.3d 557, 568 (9th Cir. 2014) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231–232 (1988)). "Although determining materiality in securities fraud cases should ordinarily be left to the trier of fact, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). To plead materiality and falsity, Somerset "must (1) specify each allegedly misleading statement or omission, (2) explain why the statement is misleading, and (3) if the allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *Id*. at 1109 (quoting 15 U.S.C. § 78u–4(b)(1)(B)).

In our May 2014 Order, this Court found that in its original Complaint, Somerset had sufficiently pled materiality as to claims three and six, but failed to plead materiality or falsity with sufficient particularity for claims one, two, four, and five. (Dkt. No. 20 at 7.)

In **claim one**, Somerset argues that Defendants committed securities fraud by misrepresenting FPH's "assets and revenue" while soliciting Moore to purchase units of stock. (Amended Complaint, Dkt. No. 24 at ¶ 4.3.) Specifically, Somerset alleges that Defendants' repeated statements that FPH had $336,000 in monthly revenue from the Pala Signs (*id*. at ¶ 3.45) and that the two signs were operational in California (*id*. at ¶ 3.11.) were false. In our

previous Order granting in part Defendants' first Motion to Dismiss, this Court noted that "Somerset has failed to plead with specificity what percentage of FPC's total or expected income the California signs represented, how far $400,000 was from FPC's actual revenue, or whether FPH still expected revenue from the California signs even if they had been 'turned off' or 'terminated.'" (Order, Dkt. No. 20 at 8.) We informed Plaintiff that if it was to satisfy the PSLRA's heightened pleading standard with regard to materiality, its amended complaint "must affirmatively specify . . . *the reason or reasons* why [each] statement or omission was misleading." (*Id.* (citing 15 U.S.C. § 78u–4(b)(1)(B)).)

The Amended Complaint now comports with our instructions and has established the materiality element with regard to claim one. In the Amended Complaint, Plaintiff answers the Court's question regarding the percentage of projected monthly revenue that was comprised of the revenue from the already-terminated and set-to-be-dismantled Pala Signs (Amended Complaint, Dkt. No. 24 at ¶ 3.45.) Plaintiff now explains the reasons why this misrepresentation was misleading. (*Id.* at ¶ 3.18; 3.39; 3.40; 3.46 ("Had Somerset known that at least one third (1/3) of the Operational Results and Projected revenues for the beginning of 2010 and one fifth (1/5) of the average monthly revenue thereafter was fabricated from the [already] terminated Pala Signs, Somerset would not have purchased FPH units from W2W, MacCord and Doyle.").) Further, in the Amended Complaint, Plaintiff pleads sufficient facts regarding the falsity of any statements of the expected revenue from the Pala Signs. As Plaintiff explains in its Response:

> MacCord's prior declaration confirms that when he and Doyle reported the operating Pala Signs to Somerset in October 2009, he knew "the Pala deal fell apart in June 2009." . . . It is inconceivable that Doyle, as CFO of a small company with less than 20 employees would not know that no revenue was coming from the terminated Pala Signs and, therefore, his projections of that non-existent revenue were unquestionably false and misleading.

(Plaintiff's Response to Defendants' Motion to Dismiss Amended Complaint, Dkt. No. 26 at 8-9 (citing Amended Complaint, Dkt. No. 24 at ¶ 3.11).) In their Motion to Dismiss, Defendants do

not sufficiently address that alleged October 2009 misrepresentation (Amended Complaint, Dkt. No. 24 at ¶ 3.39) of the continued operation of the Pala Signs. (*See* Motion to Dismiss, Dkt. No. 25 at 8 (focusing instead on the June 2009 misrepresentation regarding the Pala Signs).) Further, Plaintiff pleads sufficient facts regarding Defendants' knowledge of the falsehood to take such misrepresentation out of the safe harbor for forward-looking statements. (*See* Amended Complaint, Dkt. No. 24 at ¶¶ 3.11; 3.6; 3.7.) Therefore, Plaintiff has now pled claim one with sufficient particularity, especially as regards the Pala Signs' termination and expected revenue, to meet their materiality requirement.

With regard to **claim two**, in which Somerset alleges that Defendants failed to disclose that Fourpoints was insolvent before and during their solicitation of Moore, Somerset has also adequately amended the materiality aspect. The Court previously found fault with Plaintiff's original Complaint, which only included allegations of omissions of this information at points in time that the Plaintiff had already invested in FPH. (*See* Order, Dkt. No. 20 at 8.) However, in its Amended Complaint, Plaintiff alleges particular facts regarding the time at which Doyle and MacCord ought to have known that Fourpoints was insolvent (*see* Amended Complaint, Dkt. No. 24 ¶ 3.13),[1] as well as facts regarding the *subsequent* purchase of units in reliance of the reports containing the omissions (*see id.* at ¶ ¶ 3.50-51).[2] While Defendants are correct in arguing that knowledge of insolvency in late July would not give rise to post-hoc material "omissions" in June 2009 (*see* Defendants' Motion to Dismiss, Dkt. No. 25 at 10), this argument does not rebut

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[1] "According to a declaration under oath by Doyle in the prior litigation with FPH, by late July 2009, FPC was insolvent. Doyle declares that at that time FPC 'simply did not have a large enough revenue base from its modest sign plant to afford [interest and preferred dividend] payments, and without further funding to develop more opportunities in Native America, the best Fourpoints could do was exist on current operations, deferring these interest and debt payments until a new funding partner could be found.'"

[2] "In November 2009, Moore formed Somerset to purchase common units of FPH from W2W. . . . On or about December 4, 2009, Somerset entered into two Assignment of Units agreements with W2W, FPH and MacCord whereby Somerset purchased a total of 92.2 common units of FPH for the purchase price of $250,000.00, or $2,711.50 per unit."

Plaintiff's now-sufficient pleading with regard to the insolvency omissions inherent in any of Defendants' post-July representations. (*See e.g.*, Amended Complaint, Dkt. No. 24 at ¶ 3.44 ("On or about October 27, 2009, under the direction of MacCord, Doyle . . . on behalf of FPH in the offer and sale of FPH common units, provided to Moore via email in Washington FPC's revised Operational Results/Projection Summary for 2009-10.").) And such knowledge of the insolvency would suffice to take the statements out of the Section 78u-5 "safe harbor." Thus, Plaintiff's Amended Complaint now pleads facts sufficient to fulfill the materiality requirement for claim two.

Although Defendants challenge **claim three** (valuation of the company/percentage of units omission) on materiality and falsity grounds in their Motion, the Court has already found that Somerset has sufficiently plead materiality for this claim, in the original Complaint. (Order, Dkt. No. 20 at 7.) Even if there have been some changes to claim three from the original Complaint, the Amended Complaint still alleges that Plaintiff agreed to purchase five percent of FPH for $2 million dollars, resulting in a company valuation almost $30 million dollars lower than the actual valuation. (Amended Complaint, Dkt. No. 24 at ¶¶ 3.23; 3.25.) This suffices to establish falsity.

In **claim four**, Somerset claims that Defendants failed to disclose that Lubin was reducing its interest in FPH by selling its units to W2W and that W2W purchased those units at a much lower price than it offered to Somerset. In our May 2014 Order, this Court informed Plaintiff that we could not determine whether this omission would have "significantly altered the total mix of information" available. (Dkt. No. 20 at 9.) We instructed Plaintiff to plead facts such as why Lubin chose to reduce its interest, how many units of stock Lubin sold to W2W, or the difference in price between the two sales. Plaintiff largely comported with these requests and pled additional facts pertinent to this claim in paragraphs 3.65-3.69 of the Amended Complaint. (Dkt. No. 24 at 15.) For instance, Plaintiff states that Lubin sold 122.22 units to W2W for $1636 per unit (*id.* at ¶ 3.65) and that if it had known that "an original investor, Lubin Outdoor"

"valued FPH units at nearly 40% less than what Somerset was paying . . . [and] was cashing out nearly a fifth of its original investment. . . Somerset would have required an explanation . . . before purchasing additional FPH units" (*id.* at ¶¶ 3.64-68). While Defendants are correct in pointing out that Plaintiff's Amended Compliant did not plead facts speculating *why* Lubin was selling these shares (*see* Defendants' Motion to Dismiss, Dkt. No. 25 at 11), the other additional facts pleaded by Plaintiff in the Amended Complaint nevertheless suffice to explain the reasons why this omission would be misleading (such as the fact that these shares were being unloaded by an original investor at a full *forty percent* less than what Somerset was paying, which suggests a lack of confidence in the company's future). Thus, Plaintiff has fulfilled the materiality pleading requirement for claim four.

In **claim five**, Plaintiff alleges another omission –Defendants' failure to disclose that FPH was in loan forbearance, deferring its interest payments to FP Investors. The Court previously found fault with Plaintiff's failure to explain the size of the interest payments, to provide details of all outstanding obligations to FP Investors, and to explain how Plaintiff came to know such information. (*See* Order, Dkt. No. 20 at 9.) In the Amended Complaint, Plaintiff provides more detail regarding FPC's forbearance agreement with debtor FP Investors. For instance, in paragraphs 3.14 and 3.15, Plaintiff states that:

> According to an FPC "Projection Summary 2010" provided by Doyle to Somerset, semi-annual dividends due FP Investors were $220,000. According to an FPC Statement of Operations January through June 2009 provided to Somerset by Doyle, FPC's monthly interest obligation averaged $63,112. Doyle declares that interest on the FP Investors loan rose from 12% to 15% in November, 2009, and MacCord declares that the January 2010 quarterly interest payment to FP Investors was $249,167. According to FP Investors, as of November 1, 2009 FPC was operating under a forbearance agreement deferring interest and distribution payments to FP Investors *in order to* allow MacCord to recapitalize FPH, pay off all loans from FP Investors and to redeem all FP Investor's preferred membership units in FPH.

(Dkt. No. 24 at 5 (emphasis added).) These purported facts lend credibility to Plaintiff's

allegations of Defendants' repeated omissions of the forbearance agreement. These facts also call into question the veracity of statements that FP Investors had committed to provide an additional $6 million dollars of funding in 2009 when in truth, according to MacCord himself, FP Investors would not invest any longer. (*See* Amended Complaint, Dkt. No. 24 at 7.) In terms of the reasons this omission would have altered the "total mix" of information available to Somerset, Plaintiff plainly states that "[h]ad Somerset known that neither FP Investors nor actual revenues would fund growth, it would not have purchased FPH units." (*Id.*) Thus, it is not the case, as Defendants imply in their Motion to Dismiss (*see* Dkt. No. 25 at 12) that Plaintiff's only "reason" for the materiality of this omission is its conclusory statement identifying such information as "critical" at paragraph 4.29 of the Amended Complaint (Dkt. No. 24 at 21). In the Amended Complaint, Plaintiff has pled significant additional facts regarding the specific omissions and centrality of these omissions to the future of financing opportunities available to Fourpoints, and thus, its performance outlook. Such additional information fulfills Plaintiff's materiality burden as to claim five.

Accordingly, claims one, two, four and five now plead sufficiently specific and particular facts to satisfy the 10b-5 materiality requirements at this stage.

2. **Scienter**

In our May 2014 Order, we found that Plaintiff had failed to establish the scienter element for claims one, two, four, five, and six. However, we stated that:

> [I]f Plaintiff's amended complaint adequately pleads that the misrepresentations and omissions were material, the Court would likely be satisfied that scienter would also be demonstrated by virtue of MacCord's and Doyle's positions within the company, their direct role in courting Moore to invest, and their alleged actual knowledge of the falsity and materiality of the statements.

(Order, Dkt. No. 20 at 11.) As explained in Section II(b)(1), *supra*, Plaintiff has indeed established materiality for these claims. Further, Plaintiff has interspersed the Amended Complaint with several explanations justifying its allegations that the several misrepresentations

and omissions were made intentionally. Moreover, Defendants do not make scienter objections in their Motion to Dismiss the Amended Complaint (Dkt. No. 25). Thus, this Court is satisfied that Plaintiff has pled Rule 10b-5's requirement of scienter.

3. **Causation**

Rule 10b-5's causation requirement "includes both transaction causation, that the violations in question caused the plaintiff to engage in the transaction, and loss causation, that the misrepresentation or omissions caused the harm." *Livid Holdings*, 416 F.3d at 949. To plead loss causation, a plaintiff must make "particular allegations as to 'what the relevant economic loss might be,' and 'what the causal connection might be' between the fraud alleged and the economic losses actually suffered." *In re Gilead Sciences Sec. Litig.*, 536 F.3d at 1056 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). The misrepresentation "need not be the sole reason for the decline in value of the securities, but it must be a substantial cause." *In re Gilead Sciences Sec. Litig.*, 536 F.3d at 1055. Several circuit courts have expressed disapproval at dismissing a securities action on a 12(b)(6) motion for lack of causation. *See id*. at 1057 (citing to Second and Third Circuit opinions holding that resolving causation is inappropriate at the motion to dismiss stage). However, the Supreme Court has held that a complaint must, at a minimum, "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharm*, 544 U.S. at 347.

In our May 2014 Order, we found that Plaintiff had "failed to plead any statements relating to how the false statements and/or omissions about FPH's revenue and assets (claim one), FPH's alleged insolvency (claim two), the withdrawal of FP Investors' support (claim three), Lubin's stock sale (claim four), or the default [now forbearance] on the interest payment to FP Investors (claim five) affected its decision to purchase stock or caused the loss it suffered." (Dkt. No. 20 at 12.) We instructed Plaintiff that "to adequately plead causation, the [amended] complaint must, at minimum, include some allegation that Somerset would not have engaged in the transaction but for the misstatements and omissions or that these misrepresentations and

omissions actually caused some related loss." (*Id.* at 12-13.) *See also Red River Res., Inc. v. Mariner Sys., Inc.*, No. C11-02589, 2012 WL 2507517 at *7 (D. Ariz. June 29, 2012) (holding that loss causation requirement was met when plaintiff stated it would not have invested had it known the opportunity was artificially inflated due to defendant's misstatements).

In Plaintiff's amended complaint, Plaintiff states, in reference to claims one through five, that "as a direct and proximate result of their unlawful acts, W2W, MacCord and Doyle, obtained money from Somerset and caused Somerset to suffer damages exceeding $75,000.00." (Amended Complaint, Dkt. No. 24 at ¶¶ 4.9 (claim one); 4.15 (claim two); 4.21 (claim three); 4.27 (claim four); and 4.33 (claim five).) This repeated statement is a summary of the averments that continue throughout the Amended Complaint that Plaintiff would not have bought the FP units, or would have at least asked more questions before making the purchases, had these misrepresentations and omissions not been made. (*See e.g.*, Amended Complaint, Dkt. No. 24 at 5 ("Somerset was not interested in raising money for a startup in the billboard industry, and was only attracted to FPC by its positive cash flow, its capital to achieve the professed major growth opportunity to build out its network of signs over the next three to five years, and, significantly, the ability of FPC to return the guaranteed distributions right away.").) Thus, Plaintiff now identifies the theory by which such harm occurred, as well as the specific quantity of that harm.

Defendants also impliedly argue that even if the statements in Plaintiff's Amended Complaint were sufficient to establish transaction causation (i.e., that Plaintiff would not have bought the units but for the omissions and misrepresentations), they are not sufficient to establish either reliance (i.e., that Plaintiff actually believed and was motivated to purchase by the omissions and misstatements) or loss causation (i.e., that Defendants' alleged misrepresentations and omissions actually caused the economic loss).

However, Plaintiff successfully pleads reliance in its Amended Complaint (Dkt. No. 24 at 13), and explains further in its Response to Defendants' Motion to Dismiss that:

Somerset's Amended Complaint explicitly alleges that it "justifiably did rely"

> upon the false statements of assets and revenue when it paid $2,018,000 for worthless units of the insolvent FPH. Somerset also alleges that its valuation and decision to purchase units "relied upon" and "depended upon" Defendants' misrepresentations of growth, expansion and increasing profits. While Somerset could not have relied on what Defendants' concealed, Somerset does explicitly allege that it would not have purchased the worthless units had it known of FPH's insolvency or forbearance agreement. Somerset also alleges that FPC's healthy financial condition was "a critical factor" that it "depended upon" in its decision to purchase units, such that had Somerset known of FPC's actual insolvency it would not have purchased worthless units. Somerset's Amended Complaint also alleges that Defendants knew that FPC's insolvency and its forbearance agreement were "critical information undermining FPC's reported assets, revenues and profit and material to Somerset's decision to purchase." In addition, Somerset's Amended Complaint alleges that Somerset "relied upon the false capitalization" and "[h]ad Somerset known" of prior unit sales and concurrent Lubin sales at a lower price it would not have purchased FPH units, or at least not paid the offered price. Somerset has sufficiently alleged that its $40 Million valuation of the company was nearly three-quarters higher than the value represented by the actual percentage of ownership sold by MacCord, and that it paid $2,666 per unit for 757.16 units when internal sales were at $1636 per unit.

(Plaintiff's Response Opposing Defendants' Motion to Dismiss Amended Complaint, Dkt. No. 26 at 15-16 (citing Amended Complaint, Dkt. No. 24 at ¶¶ 4.7; 3.21; 3.24; 3.27; 3.38; 3.49; 3.70; 4.12; 4.29; 3.64; 3.68; 3.67; 3.25; 3.65).) These allegations sufficiently plead reliance, especially at this motion to dismiss stage, at which the Supreme Court only requires that the complaint "provide the defendant with some indication of the loss and the casual connection that the plaintiff has in mind," *see Dura Pharm*, 544 U.S. at 347.

And, with regard to loss causation, Plaintiff correctly states that "because FPH is a privately held company, Somerset may prove loss causation by showing that the . . . misrepresentations or omissions induced Somerset to purchase units and that the revelation of FPC's actual financial condition *is related to* Somerset's loss." (Plaintiff's Response Opposing Defendant's Motion to Dismiss, Dkt. No. 26 at 16 (emphasis added) (citing *WPP Lux. Gamma Three Sarl*, 655 F.3d at 1054).) Plaintiff's repetitions that it would not have purchased FPH units but for the misrepresentations and omissions, *and the fact that those very misrepresentations and*

omissions logically "touched upon" the reason Somerset's units allegedly became worthless is a sufficient pleading of loss causation at this stage. *See McGonigle v. Combs*, 968 F.2d 810, 821 (9th Cir. 1992). Defendants remind the Court that *McGonigle* holds that "[t]he plaintiff must prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct or proximate way responsible for his loss." (Defendants' Reply, Dkt. No. 27 at 6 (citing 968 F.2d at 821).) However, throughout the Amended Complaint, Plaintiff has sufficiently linked the various omissions and misrepresentations (such as the improbability of future revenue from the Pala Signs, the concealed dumping of the stock by original investors, and the hidden forbearance arrangements with the company's debtors), to the very financial faults within the company that Plaintiff alleges caused the losses in excess of $75,000 dollars. Further, it is also true that discovery may yield a clearer picture of the linkage between FP's financial troubles and the alleged misrepresentations and omissions.

Thus, Plaintiff has successfully discharged its causation burden in this Amended Complaint. As these previous three subsections address Defendants' objections to the Amended Complaint, as well as the Court's previous objections to Plaintiff's first Complaint, it stands that Plaintiff has successfully pled under the general 12(b)(6) plausibility standard, the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) (particularity), and the PSLRA's myriad requirements. Therefore, Defendants' Motion to Dismiss is DENIED with regard to Plaintiff's federal law claims.

C. Washington State Law Claims

In our May 2014 Order, we explained that, given the less onerous pleading standards presented by the Washington Securities Act, Plaintiff's previously-dismissed claims one, two, four, and five could be resurrected in light of a showing of Rule 10b-5 materiality. (Order, Dkt. No. 20 at 14.) Plaintiff has now successfully pleaded materiality with regard to these four claims, *see* Section II(B)(1), *supra*. Defendants do not contest this in their Motion to Dismiss. Therefore, the Washington state law basis for Plaintiff's claims has been successfully pled.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss the Amended Complaint (Dkt. No. 25) is DENIED.

DATED this 30th day of October 2014.

John C. Coughenour
UNITED STATES DISTRICT JUDGE